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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 SHAWN K. BROWN,

Case No. 3:22-cv-00130-MMD-CSD

7 Petitioner,

ORDER

8 v.

9 GITTERE, *et al.*,

10 Respondents.
11

12 **I. SUMMARY**

13 Petitioner Shawn K. Brown, a Nevada prisoner, has filed a counseled Amended
14 Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF No. 31 (“Amended
15 Petition”).) Currently before the Court is Respondents’ motion to dismiss the Amended
16 Petition. (ECF No. 45 (“Motion”).) Brown opposed the Motion¹, and Respondents replied.
17 (ECF Nos. 63, 68.) For the reasons discussed below, the Court denies the Motion.²

18 **II. BACKGROUND**

19 A jury found Brown guilty of burglary while in possession of a deadly weapon and
20 murder with the use of a deadly weapon. (ECF No. 51-6.) Brown was sentenced to, *inter*
21 *alia*, life in prison without the possibility of parole. (*Id.*) Brown appealed, and the Nevada
22 Supreme Court affirmed on October 24, 2019. (ECF No. 32-7.)

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25 ¹Brown requests leave to exceed the page limit for his opposition. (ECF No. 65.)
The Court finds that good cause exists to grant the request.

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27 ²The Court notes that Respondents provided courtesy copies of their exhibits.
However, under the Court’s Scheduling Order, it was ordered that “[c]ourtesy copies of
28 exhibits shall not be provided.” (Emphasis in original). Respondents are warned to heed
the Court’s orders.

1 While his direct appeal was still pending, Brown filed a state habeas petition on
2 November 15, 2018. (ECF No. 51-14.) However, on February 27, 2019, Brown moved to
3 withdraw his petition, explaining that he recently learned that his “1 year time limit does
4 not begin until [his] direct appeal is final.” (ECF No. 51-42 at 3.) Brown requested that his
5 petition be dismissed without prejudice “so that upon completion and finality of [his] direct
6 appeal, [he] may file the necessary, timely and proper writ of habeas corpus.” (*Id.* at 4.)
7 On April 2, 2019, the state court held a hearing on Brown’s motion to withdraw and stated
8 the following:

9 [Brown] had some guy up at the prison help him file [his petition], and he
10 didn’t realize he actually had a longer time to get it filed because of the time
11 period starting after his direct appeal. So he didn’t want this one to move
forward. So we will go ahead and grant his request and withdraw the current
petition.

12 (ECF No. 51-44 at 3.) The state court never entered a written order disposing of the
13 petition. Instead, the state court merely closed the case. (ECF No. 51-45.)

14 Later, after his direct appeal had concluded, on November 25, 2019, Brown moved
15 for a new trial or to have his judgment vacated, alleging, in part, issues of ineffective
16 assistance of counsel. (ECF No. 51-48.) The state court held a hearing on the motion and
17 explained that “rather than denying part of the motion, the . . . remedy . . . is to give him
18 an opportunity to convert his motion into a proper writ of habeas corpus.” (ECF No. 52-2
19 at 3.) The state court indicated that (1) it would “give Mr. Brown 45 days to convert the
20 ineffective assistance allegations in his motion for a new trial into a proper post-conviction
21 writ of habeas corpus,” and (2) Brown was “still within the time period to file a writ because
22 he has a remittitur from the direct appeal issued in November of 2019.” (*Id.* at 3-4.) Instead
23 of converting his motion into a habeas petition, Brown moved to withdraw his motion for
24 a new trial. (ECF No. 52-3.) The state court held a hearing on the motion and, importantly,
25 explained that Brown “actually [had] until November of 2020 to file a writ because
26 remittitur didn’t issue on the direct appeal until November of 2019.” (ECF No. 52-5 at 3.)
27 The state court directed that “the minutes . . . reflect that he’s got his whole statutory time
28 period to file the writ, which goes up and through November of this year.” (*Id.* at 4.) The

1 state court then entered a written order advising Brown that “he has until November 21,
2 2020, . . . to file a Post Conviction Writ.” (ECF No. 52-8 at 3.)

3 Brown filed a second habeas petition on November 9, 2020. (ECF No. 32-9.) At
4 this point, Brown’s case had been assigned to a new judge. Contrary to the previous
5 judge’s implied rulings that Brown’s second state habeas petition would not be barred
6 because his first petition was withdrawn, the new judge bizarrely denied the petition,
7 finding that it was “procedurally barred because it is successive.” (ECF No. 52-24.) The
8 new judge ruled on Brown’s second habeas petition before Brown even had a chance to
9 file a reply. (See ECF Nos. 52-22, 52-23.) Brown appealed, and the Nevada Court of
10 Appeals affirmed on October 7, 2021, agreeing that Brown’s second petition was
11 successive. (ECF No. 32-14.) Remittitur issued on November 2, 2021. (ECF No. 32-15.)

12 Brown commenced this instant action on or about March 15, 2022. (ECF No. 1-1
13 at 1.) The Court appointed counsel for Brown. (ECF No. 10.) Brown filed his counseled
14 Amended Petition on January 26, 2024. (ECF No. 31.) Brown raises the following grounds
15 for relief in his Amended Petition:

- 16 1. His trial counsel failed to adequately present mitigation evidence at
sentencing.
- 17 2. His trial counsel failed to properly object to the introduction of a
random brick (purportedly similar to the murder weapon).
- 18 3. The State suppressed immunity deals.
- 19 4. His trial counsel failed to investigate whether immunity deals had
been given.
- 20 5. His trial counsel failed to object to testimony.
- 21 6. The State stated facts not in evidence and misrepresented the
evidence during closing argument.
- 22 7. The State repeatedly vouched for the credibility of witnesses.
- 23 8. The trial court improperly instructed the jury on the felony-murder
rule.
- 24 9. His trial counsel failed to move to strike certain jurors for cause.
- 25 10. The trial court improperly admitted the testimony of Dr. Roquero.
- 26 11. He is factually innocent of murder.
- 27 12. His trial counsel failed to call a forensic toxicologist/chemist.
- 28 13. His trial counsel improperly opposed a cautionary instruction
regarding accomplice testimony.
14. There were cumulative errors.

(ECF No. 31.)

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1 III. DISCUSSION

2 Respondents argue that: (1) Brown's original petition and Amended Petition are
3 both untimely; (2) ground 14, Brown's cumulative error claim, does not raise a cognizable
4 claim under the Federal Constitution; and (3) grounds 1 through 5 and grounds 9 through
5 14 are unexhausted. (ECF No. 45.) The Court will address these arguments in turn.

6 A. Timeliness

7 The Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes a 1-year
8 period of limitations for state prisoners to file a federal habeas petition pursuant to 28
9 U.S.C. § 2254. The 1-year limitation period, *i.e.*, 365 days, begins to run from the latest
10 of 4 possible triggering dates, with the most common being the date on which the
11 petitioner's judgment of conviction became final by either the conclusion of direct
12 appellate review or the expiration of the time for seeking such review. *See* 28 U.S.C. §
13 2244(d)(1)(A). For a Nevada prisoner pursuing a direct appeal, a conviction becomes final
14 when the 90-day period for filing a petition for certiorari in the Supreme Court of the United
15 States expires after a Nevada appellate court has entered judgment or the Supreme Court
16 of Nevada has denied discretionary review. *See Harris v. Carter*, 515 F.3d 1051, 1053
17 n.1 (9th Cir. 2008); *Shannon v. Newland*, 410 F.3d 1083, 1086 (9th Cir. 2005); Nev. Sup.
18 Ct. R. 13. The federal limitations period is tolled while "a properly filed application for State
19 post-conviction or other collateral review with respect to the pertinent judgment or claim
20 is pending." 28 U.S.C. § 2244(d)(2).

21 The AEDPA limitation period is tolled while a "properly filed" state postconviction
22 petition or other collateral review is pending. 28 U.S.C. § 2244(d)(2). But no statutory
23 tolling is allowed for the period between finality of a direct appeal and the filing of a petition
24 for postconviction relief in state court because no state court proceeding is pending during
25 that time. *See Nino v. Galaza*, 183 F.3d 1003, 1006-07 (9th Cir. 1999); *Rasberry v.*
26 *Garcia*, 448 F.3d 1150, 1153 n.1 (9th Cir. 2006). And no statutory tolling is allowed for the
27 period between the finality of a postconviction appeal and the filing of a federal petition.
28 *See Nino*, 183 F.3d at 1007.

1 In this case, under Respondents' calculations, Brown's conviction became final
2 when the time expired for filing a petition for writ of certiorari with the United States
3 Supreme Court following the Nevada Supreme Court's denial of his direct appeal on
4 January 22, 2020. The federal statute of limitations began to run the following day:
5 January 23, 2020. Brown filed his second state petition on November 9, 2020, tolling the
6 AEDPA clock. As a result, 291 days elapsed between the finality of Brown's judgment
7 and the filing of his second state petition. The remaining 74 days of the AEDPA limitations
8 period was statutorily tolled during the pendency of all proceedings related to his second
9 state petition. The remittitur was issued by the Nevada Supreme Court on November 2,
10 2021. As such, according to Respondents, Brown's AEDPA clock restarted on November
11 3, 2021, and expired 74 days later on January 17, 2022,³ making his pro se petition filed
12 on March 15, 2022, and his Amended Petition, filed on January 26, 2024, untimely.

13 Brown contends that he is entitled to statutory tolling because the state court never
14 issued a written order disposing of his first state habeas petition, so his statute of
15 limitations has not begun to run. (ECF No. 63.) The Court agrees. Given that the Nevada
16 Court of Appeals based its October 7, 2021, ruling, in pertinent part, on Brown's
17 "previously filed . . . postconviction petition for a writ of habeas corpus," Brown's first state
18 habeas petition plays a key role in the Court's AEDPA analysis. As such, even though
19 Brown elected to voluntarily withdraw his first state habeas petition, the Court cannot
20 ignore its presence or effect on Brown's AEDPA statute of limitations, as Respondents
21 have done in their Motion.

22 Since the Nevada Court of Appeals treated Brown's first state habeas petition as
23 a first petition for purposes of the bar against second and successive petitions,⁴ Brown's

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25 ³74 days from November 3, 2021, was Sunday, January 16, 2022.

26 ⁴Since there was no determination on the merits of Brown's first state habeas
27 petition because Brown voluntarily withdrew it, it is surprising that the Nevada Court of
28 Appeals treated Brown's first state habeas petition as a first petition for purposes of the
bar against second and successive petitions. See NRS § 34.810(3) ("A second or
successive petition must be dismissed if the judge or justice determines that it fails to

1 first state habeas proceedings statutorily tolled his AEDPA statute of limitations. Although
 2 Brown moved to voluntarily withdraw his first state habeas petition, the state court never
 3 issued a written order disposing of it. Rather, on April 2, 2019, the state court merely
 4 verbally “granted [Brown’s] request and withdr[e]w” the petition and then nearly seven
 5 months later entered a boilerplate order directing the clerk “to statistically close th[e]
 6 case.” (See ECF Nos. 51-44 at 3, 51-45.) This is problematic because Nevada law
 7 required the state court to enter a *written* judgment or order resolving the habeas action,
 8 not just closing the case. See Nev. R. App. P. 4(b)(6)(B) (“The district court judge must
 9 enter a written judgment or order finally resolving any postconviction matter. If the district
 10 court judge first makes an oral pronouncement of a final decision in such a matter, the
 11 written judgment or order must be issued within 21 days after the district court judge’s
 12 oral pronouncement.”); see also NRS § 34.575 (1) (“[T]he appeal [of a denial of a writ of
 13 habeas corpus] must be made within 30 days after service by the court of *written* notice
 14 of entry of the order or judgment.” (Emphasis added)). Because: (1) the issue of whether
 15 a state application for postconviction relief is “pending” for purposes of 28 U.S.C. §
 16 2244(d)(2) is governed by state law⁵; (2) Nevada state law required the state court to
 17 enter a written order or judgment disposing of Brown’s first state habeas petition; and (3)
 18 the state court did not enter a written order disposing of Brown’s first amended petition,
 19 the Court considers Brown’s first state habeas proceedings to still be pending. Because
 20 (1) Brown’s first state habeas petition was filed before his direct appeal was decided,
 21 meaning no time elapsed between the finality of Brown’s judgment and the filing of his
 22 state petition, and (2) Brown’s AEDPA limitation period is still being statutorily tolled due
 23 to his “pending” first state habeas petition, Brown’s Amended Petition is timely.

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 26 allege new or different grounds for relief and that the prior determination was on the merits
 27 or, if new and different grounds are alleged, the judge or justice finds that the failure of
 28 the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.”).

⁵See *Jones v. Hulick*, 449 F.3d 784, 789 (7th Cir. 2006), *certiorari denied* 549 U.S.
 1121.

1 **B. Cognizable claims**

2 Respondents argue that ground 14, Brown’s cumulative trial error claim, does not
3 raise a cognizable claim under the Federal Constitution. (ECF No. 45 at 8.)

4 When conducting habeas review, a federal court is limited to deciding whether a
5 conviction violates the Constitution, laws, or treaties of the United States. See 28 U.S.C.
6 § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Unless an issue of federal
7 constitutional or statutory law is implicated by the facts presented, the claim is not
8 cognizable in federal habeas. See *McGuire*, 502 U.S. at 68. Because United States
9 Supreme Court precedent has clearly established the cumulative error doctrine, ground
10 14 is cognizable. See *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (“The Supreme
11 Court has clearly established that the combined effect of multiple trial court errors violates
12 due process where it renders the resulting criminal trial fundamentally unfair.”).

13 **C. Exhaustion**

14 Respondents argue that grounds 1 through 5 and grounds 9 through 14 are
15 unexhausted. (ECF No. 45 at 9.)

16 A state prisoner must exhaust state court remedies on habeas claims before
17 presenting those claims to the federal courts. See 28 U.S.C.
18 § 2254(b)(1)(A). This exhaustion requirement ensures that the state courts, as a matter
19 of comity, will have the first opportunity to address and correct alleged violations of federal
20 constitutional guarantees. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). “A
21 petitioner has exhausted his federal claims when he has fully and fairly presented them
22 to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014).

23 Brown concedes that grounds 1 through 5 and grounds 9 through 14 are
24 unexhausted, but he argues that exhaustion should be excused because he was
25 subjected to a fundamentally unfair postconviction process. (ECF No. 63 at 41.) The Court
26 agrees.

27 The exhaustion requirement is excused if “circumstances exist that render [the
28 state court] process ineffective to protect the rights of the applicant.” 28 U.S.C. §

1 2254(b)(1)(B)(ii); *Rose v. Lundy*, 455 U.S. 509, 516 fn.7 (1982) (“[T]he exhaustion
2 doctrine does not bar relief where the state remedies are inadequate or fail to afford a full
3 and fair adjudication of the federal contentions raised.” (Internal quotation marks
4 omitted).) Here, the tortured postconviction history of this case supports a finding that
5 Brown was not afforded a full and fair adjudication of his claims. Indeed, the state court
6 assured Brown that he had the ability to file a second state habeas petition that would not
7 be successive in light of his withdrawn first state habeas petition and then denied that
8 second state habeas petition as successive. This refusal to consider Brown’s second
9 state habeas petition is deeply troubling given that it amounted to: (1) Brown not being
10 appointed state postconviction counsel to challenge his convictions and life-without-the-
11 possibility-of-parole sentence; (2) no evidentiary hearing being held on Brown’s habeas
12 claims allowing him to obtain evidentiary support for his claims; and (3) Brown not having
13 the benefit of drafting his pro se federal petition with issues previously identified by his
14 state postconviction counsel. Given that Brown was denied an opportunity for a full and
15 fair adjudication of his habeas claims in state court, the Court excuses Brown’s lack of
16 exhaustion.

17 **IV. CONCLUSION**

18 It is therefore ordered that Respondents’ Motion (ECF No. 45) is denied as follows:
19 (1) Brown’s Amended Petition is timely; (2) ground 14 is cognizable; and (3) the lack of
20 exhaustion for grounds 1 through 5 and grounds 9 through 14 is excused.

21 It is further ordered that the motion for leave to file excess pages (ECF No. 65) is
22 granted.

23 It is further ordered that Respondents have until April 30, 2025, to file their answer
24 to the Amended Petition. Brown has 30 days following receipt of the answer to file his
25 reply.

26 DATED THIS 27th Day of February 2025.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE